UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SHAMROCK FOODS COMPANY

and Case 28–CA–169970

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL–CIO–CLC

Sara S. Demirok, Esq., for the General Counsel.
Todd A. Dawson, Esq., and *Nancy Inesta, Esq.*, for the Respondent.
David A. Rosenfeld, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Phoenix, Arizona from May 24–27, 2016, and on June 9, 2016.[1] Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL–CIO–CLC (Charging Party or Union) filed the charge on February 18. The General Counsel issued the complaint on March 30, and consolidated complaint on April 25.[2] Shamrock Foods Company (Respondent or Employer) filed timely answers to the complaint and consolidated complaint.

The complaint and amended complaint alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) (1) when on January 24, it subjected its employees including Steve Phipps (Phipps) to stricter enforcement of its previously unenforced break schedule; (2) when on January 26 and February 11, it subjected Phipps to closer supervision; (3) when on February 1, it issued a verbal warning to Michael Meraz (Meraz);

[1] All dates are 2016 unless otherwise indicated.

[2] At the hearing, the General Counsel moved to withdraw complaint paragraphs 5(a) through (c), and 6(a) through (c), and 6(g) (Tr. 251). I granted the motion and severed case 28–CA–167910, and remanded those allegations to the Region 28 Regional Director (Tr. 252, 754). At the hearing, the General Counsel also initially sought to amend the complaint but then essentially withdrew the request (Tr. 252–254). In addition, a ruling on Respondent's motion to dismiss relating to some of the aforementioned complaint paragraphs is moot (GC Exh. 1(n)).

and (4) when on February 11, it verbally disciplined Phipps. The General Counsel further alleges that Respondent violated Section 8(a)(4) and (1) for these same actions because Phipps and Meraz gave testimony to the National Labor Relations Board (the Board) in the form of affidavits and/or testified at a Board hearing in case 28–CA–150157.

As discussed below, I find that Respondent violated the Act as alleged.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel and Respondent,[5] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, an Arizona corporation, maintains an office and place of business in Phoenix, Arizona, from which it is engaged in the wholesale distribution of food products. During the 12-month period ending February 18, Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Arizona. Accordingly, I find that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations but rather on my review and consideration of the entire record for this case. Furthermore, the transcripts in this case are generally accurate, but I make the following corrections to the record: "Tr." for transcript; "L." for line: Tr. 50, L. 5: "air raid" should be "error rate"; Tr. 95, L. 22: the speaker is Ms. Demirok, not Ms. Inesta; Tr. 123, L. 20: "can" should be "scan"; Tr. 126–127, L. 25–L. 1: "this service" should be "disservice"; Tr. 138, L. 3: the speaker is not Ms. Demirok, but is Ms. Inesta or Mr. Dawson; Tr. 145, L. 17: "imitated" should be "initiated"; Tr. 164, L. 7–8: "June 6" should be "GC"; Tr. 256, L. 21: the speaker is Judge Tracy, not "the witness"; Tr. 311, L. 8: the speaker after the number "22" should be Judge Tracy, not Ms. Demirok; Tr. 341, L. 2: "Santa-Marina" should be "Santamaria"; Tr. 664, L. 20: "884" should be "8(a)(4)" and "883" should be "8(a)(3)"; Tr. 670, L. 1" 884" should be "8(a)(4)"; Tr. 724, L. 21: "canceling" should be "counseling"; Tr. 727, L. 11: "two" should be "you". In addition, throughout the record the term "pallet" is misspelled as "palette".

[4] I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[5] The Charging Party joined the General Counsel's brief. Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Organization

Respondent employs approximately 800 employees in a Phoenix warehouse (Tr. 418–419).[6] These employees include order selectors, loaders, forklift operators, sanitation, inventory control, and runners.

Respondent admits that the following individuals are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act: Daniel Santamaria (Santamaria), human resources business partner; Richard Gomez (Gomez), David Garcia (Garcia), and Johnny Banda (Banda), inbound warehouse supervisors; Brian Nicklin (Nicklin), inbound warehouse manager; Ivan Vaivao (Vaivao), warehouse manager; Tim O'Meara (O'Meara), operations manager, and Mark Engdahl (Engdahl), vice-president of operations. Gomez, Garcia, and Banda, whose supervisor is Nicklin, directly supervise the receivers and forklift operators including Phipps and Meraz (Tr. 336, 661–662). Nicklin reports to Vaivao, who reports to O'Meara. O'Meara transitioned to the Phoenix warehouse from an Albuquerque warehouse operated by Respondent in December 2015, and formally began on January 1 (Tr. 667, 783). Finally, O'Meara reports to Engdahl (Tr. 95).

At all relevant times, Respondent utilized a progressive discipline policy at the Phoenix warehouse (Tr. 29). Respondent's Associate Handbook lists the progressive discipline steps as follows: Step 1 Counseling, Step 2 Verbal Warning, Step 3 Written Warning, Step 4 Final Warning/3-Day Suspension, and Step 5 Termination (GC Exh. 2).[7] However, discipline may start at any level. When an employee is issued a verbal warning on a constructive performance discussion record (CPDR or C.P.D.R.), he is given 7 weeks to remain error free of the same violation. If the 7 weeks pass without the same violation, then the verbal warning "falls off" and future disciplinary matters begin at the first step of progressive discipline, rather than proceeding to the subsequent step in progressive discipline (Tr. 32). If during the 7 weeks, the employee commits the same category of violation, then Respondent issues the next step of the discipline (Tr. 31–33).

B. Respondent's Operations

On January 24, due to a variety of business reasons, Respondent divided operations at the Phoenix warehouse by inbound (receiving) and outbound (shipping) teams (Tr. 42–44, 158, 227; R Exh. 9).[8] In anticipation of the change in operations, beginning on Monday, January 4, the employees "rebid" or submitted bids for their shifts (R Exh. 10; Tr. 229). Leading up to the

[6] Respondent refers to its employees as associates (Tr. 104). In this decision, I use the statutory term "employee."

[7] Contrary to the terms in the employee handbook, O'Meara and Vaivao testified that although counseling is the first step of discipline in the disciplinary policy, they both begin any disciplinary penalty at a verbal warning on a CPDR (Tr. 783–784, 811, 816). Furthermore, O'Meara and Vaivao admitted that the first step for discipline is actually counseling which they learned when testifying as Federal Rules of Evidence 611(c) witnesses (Tr. 783, 811).

[8] Previously, from February 8, 2015 through January 24, Respondent operated on a 24-hour basis, with three shifts per day (Tr. 221). All forklift operators reported to Nicklin (Tr. 157, 224). The forklift operators and receivers took their breaks all together (Tr. 224).

January 24 change in operations, Respondent's managers and supervisors held several meetings to discuss the schedule change and the rebidding process (Tr. 446).

In inbound (receiving) work, warehouse employees receive products from vendors delivered by truck drivers. Third-party individuals unload products from the trucks and break down the pallets (Tr. 138). Receivers verify the accuracy, quality and quantity of products received (Tr. 138). Thereafter, the receiver creates a 20-digit license plate number (LPN) for each product which is then placed on a pallet to be put away (Tr. 138–139). Forklift operators (put away forklift operators) then scan each product, location and level and put away products in designated locations including reserve slots within the warehouse (Tr. 138, 451, 456, 499, 555–556); this process is part of the "put away" procedures (Tr. 453). These designated locations are not specific and precise for each product but are rather certain areas within the warehouse (Tr. 455–456). Forklift operators may also replenish products for the order selectors (Tr. 452).

When performing their duties, inbound forklift operators use an electronic system to determine which pallet of product needs to fill an empty pick slot (Tr. 52). Thereafter, the forklift operator scans the label on the product and then scans the location, such as a reserve slot, where the pallet is being moved (Tr. 143). The computer system asks again to confirm the location, and the pallet is rescanned (Tr. 141–143).

In outbound (shipping) work, warehouse employees ship products to customers. Forklift operators (replenishment forklift operators) move products from reserve slot to a pick slot (Tr. 452–454). Pickers (order selectors) select cases based on work orders, label the products and move the products from the pick slot to the conveyer belts or to a cart to cross docking, and then loaders move the product to the trucks (Tr. 99–101, 175; R Exh. 6). If there is a full pallet pull, the picker is bypassed by the forklift operator who pulls the pallet and moves it to the loading dock (Tr. 371, 454).

If a product cannot be found, a forklift operator will call inventory control on his radio to find the product (Tr. 454). When a pallet of product becomes missing, an inventory control clerk is tasked with trying to find the missing pallet (Tr. 66–67, 562).

If a case of product is not delivered to a customer, it is defined as a "short" or "out" error (Tr. 38, 345, 363, 476).[9] These errors can affect the employees' pay as well (Tr. 117, 203). A mispick occurs when a picker selects and sends to a customer a product that he did not order (Tr. 38).

[9] Various types of shorts to customers can occur. Examples include a warehouse short when a vendor does not provide the item to the Employer who must subsequently short the customer. The customer then has the option of taking a reduced number of items or substituting the missing item with another item (Tr. 111–113, 345–346). A trans short or inventory control short occurs when a customer orders an item, a picker selects the item and confirms that the warehouse has the item, but the customer does not receive the product (Tr. 114–116).

C. Recent Litigation History

This case arises out of the latest union organizing campaign at the Phoenix warehouse.[10] Subsequently, the Union filed numerous unfair labor practice charges against Respondent. From September 8 through 16, 2015, Administrative Law Judge Jeffrey Wedekind presided over an unfair labor practice hearing, and on February 11, issued a decision finding that Respondent committed 20 violations of the Act during the course of the Union's organizing campaign, including unlawfully discharging and disciplining employees (Tr. 771–772). *Shamrock Foods Co.*, JD(SF)-05-16, 2016 WL 555903 (February 11, 2016). The parties filed exceptions and cross-exceptions to Judge Wedekind's decision, and thus, the decision is not final.

Simultaneously, on September 8, 2015, the General Counsel filed an action seeking relief pursuant to Section 10(j) of the Act in the United States District Court for the District of Arizona, which was granted on February 1 (Tr. 771). *Overstreet v. Shamrock Foods Co.*, CV-15-01785-PHX-DJH. In support of the petition, the General Counsel filed affidavits from Meraz, dated June 17, 2015, and from Phipps, dated May 21, 2015, May 28, 2015, and August 31, 2015 (Tr. 508, 700–703, 771; R Exh. 15).[11]

Thereafter, on June 10, Administrative Law Judge Keltner Locke issued a decision dismissing a complaint because the credited evidence failed to establish that Respondent knew about union activities or the existence of antiunion animus. *Shamrock Foods Co.*, 2016 WL 3213011 (June 10, 2016). Again, the decision is not final as the parties filed exceptions and cross-exceptions.

Judge Wedekind and Judge Locke's decisions, which are pending before the Board on exceptions, are not binding authority on me. See *Long Ridge of Stamford*, 362 NLRB No. 33, slip op. at 1 fn. 3 (2015), citing *St. Vincent Medical Center*, 338 NLRB 888 (2003). These decisions cannot be used to support a showing of antiunion animus or lack thereof.

D. The Union Organizing Campaign

Phipps began organizing the Union in the Phoenix warehouse in late 2014 (Tr. 662–663).[12] As he had throughout most of 2015, Phipps continued to pass out Union flyers in February and April, as well as talking about the Union to his colleagues during breaks (Tr. 664–665). Throughout 2015, Phipps passed out union flyers and met with employees during the breaks (adjusting his break times as needed) (Tr. 663–664). Recently, Phipps and Meraz passed out a December 2015 flyer which indicated that there was a change in upper management, and that although Respondent changed the warehouse manager, Respondent had not changed its anti-union fundamental policies (Tr. 666; GC Exh. 19). Also in December 2015, Phipps and others protested outside the Phoenix warehouse (GC Exh. 24). From February 9 through 11, Phipps

[10] Previously, the Teamsters attempted to organize Respondent's employees in the Phoenix warehouse. At that time, the Board determined that Respondent committed several violations of the Act. See *Shamrock Foods Co.*, 337 NLRB 915 (2002), enfd. 346 F.3d 1130 (D.C. Cir. 2003). The Teamsters organizing campaign was unsuccessful.

[11] Some, if not all, these affidavits formed a part of the investigation in case 28–CA–150157.

[12] As background, in April 2015, Phipps announced to his coworkers and supervisors during the lunch break that he was on the union organizing committee, and would answer any questions (Tr. 663).

passed out a union flyer highlighting the District Court's decision to grant the Board's request for Section 10(j) relief (Tr. 673–674; GC Exh. 9). Phipps testified during the September 2015 trial, and his affidavits were used to support the Board's request for injunctive relief. Phipps also attended the January 6 oral arguments for the Section 10(j) injunction (Tr. 703, 771).

Meraz learned about the union organizing campaign in November 2014 from Phipps, and became actively involved in the union campaign in April 2015 when he signed an authorization card (Tr. 501, 504). Like Phipps, Meraz passed out union flyers throughout most of 2015 and discussed the benefits of union representation (Tr. 506, 513, 516–517, 568; GC Exh. 19). Although Meraz did not testify in the September 2015 trial, he attended the trial for 2 days (Tr. 508). In addition, his affidavit was used as a supporting document for the Board's request for injunctive relief.

As for Respondent's knowledge of union activity, Santamaria, Vaivao, and Nicklin admitted to being aware of the union organizing campaign and that some employees were interested in being represented by the Union at the warehouse (Tr. 25, 104, 436). Vaivao testified that employees approached him, complaining that union organizers were "harassing" the employees, and asked, "hey, how can you make it stop, how can you tell these guys to stop" (Tr. 104–105). Since at least April 2015, Vaivao also admitted that he knew Phipps was involved in Union activities (Tr. 105, 107, 151). Vaivao knew that Phipps along with other employees handed out flyers promoting the Union (Tr. 108–109, 167–168). Gomez also seemed generally aware through "hearsay" that Phipps was organizing on behalf of the Union but he denied knowing that Meraz was involved (Tr. 388–389, 858). Vaivao admitted that he knew Meraz favored the Union after the unfair labor practice hearing in September 2015 as well as knowing that Meraz had written a statement for the Board (Tr. 804, 813).

In addition, Vaivao admitted to being aware in September 2015 that the General Counsel made a request for Section 10(j) relief under the Act, and that the request was granted in February (Tr. 186, 190).[13] Vaivao's knowledge came from the posting Respondent was ordered to place in the warehouse (Tr. 190).

E. January 24: Employees' Breaks

Respondent always provides a meal break and two 15-minute breaks to its warehouse employees (Tr. 90). Since the January warehouse reorganization, Respondent requires employees on the inbound and outbound teams to take their breaks with their teams (Tr. 215–216, 231, 273, 279–280, 785). In fact, for years, Respondent has scheduled breaks for employees, and these break times rarely varied, but could fluctuate based upon the decision of a supervisor (Tr. 103, 276, 303, 327, 445, 789, 808–809, 827–828). Generally, employees should take their breaks at the same time (Tr. 157). Employees commonly know the break times for

[13] Incredulously, O'Meara denied being aware of the district court injunction, and denied reading the notice posting required by the district court order (Tr. 420–421). I did not find O'Meara to be a credible witness. O'Meara testified in a defensive manner, and denied knowledge of adversarial matters affecting the Phoenix warehouse (Tr. 421). As the newly appointed Phoenix operations manager, one would expect O'Meara to have more knowledge than knowing "some things are going on" of the legal matters affecting his warehouse. In response to whether he has seen any union flyers, O'Meara cavalierly responded that he has seen "stuff that's been thrown in the break room" (Tr. 421).

each shift, and tickers and electronic message boards announce break start and end times (Tr. 102, 159, 272).

However, since the January warehouse reorganization, Respondent began posting and enforcing the schedules for breaks for each shift for the employees (Tr. 156, 158, 389–390; R. Exh. 8; GC Exh. 11(a) and 11(b)). Also Respondent began posting the breaks on the weekly schedule (GC Exh. 12; Tr. 157–158, 270).

On January 24, at the beginning of the new shift schedules, Banda met with Phipps and two other inbound forklift operators (Tr. 676–677, 718, 778). Banda told them that breaks and lunch times were now posted, and needed to be taken at scheduled times (Tr. 676, 779). Phipps told Banda that it was a change in policy to post breaks on the schedule and to enforce that employees take breaks during the scheduled times (Tr. 676). Phipps testified that Banda replied that there was a change in policy enforcement (Tr. 676).[14] The meeting lasted only a few minutes (Tr. 780).

With regard to *enforcing* the break rules, Phipps credibly testified that prior to the January reorganization, "[W]e are allowed to take those as long as we didn't exceed the timeframes pretty much wherever we wanted to as long as it didn't interfere with what was going on the floor. And everybody was very careful about that. So I would just wait, for example, instead of taking my second break at 1:00, I would take it at 1:20 or 1:30 when the other crews went to lunch." (Tr. 665, 693, 716). Phipps altered his break schedule so he could distribute union flyers and talk to employees on other break times. Phipps described how he would begin the week by taking his breaks as designated but as the week progressed would alter the times of his breaks so he could speak to the employees who took breaks during other times (Tr. 664–665). Phipps testified that in January with the new schedules and shifts, Respondent began enforcing the break schedule for all inbound forklift operators (Tr. 716–717).[15]

Current forklift operator Matt Sheffer (Sheffer) testified that break times have been designated for the many years he has worked at the Phoenix warehouse (Tr. 650–651).[16] But Sheffer explained that prior to January, he had always had flexibility of when to take his breaks depending on the urgency of his workload (Tr. 652). In January, Banda and Gomez told Sheffer

[14] Banda denied telling Phipps that there would be a change in enforcement of the break policy (Tr. 779). I credit Phipps' version of this conversation as Banda's statement contradicts Respondent's actions subsequent to the organization change where the break policy was communicated in writing on the schedules and where Respondent enforced the policy that breaks should be taken by employees at the times designated. Furthermore, Sheffer also confirmed that Respondent told him that he must take his breaks during the designated time periods.

[15] I credit Phipps' testimony regarding the enforcement of the break policy as it was corroborated by the testimony of current employee Matt Sheffer, who I found credible and sincere.

[16] Sheffer was a supervisor for 18 years before he voluntarily stepped down and has been an inbound forklift operator for the past 4 years (Tr. 833).

that he must take his breaks during designated times (Tr. 652). However, prior to January, Sheffer testified that there was no discussion of break times, and that he had never been disciplined for taking his breaks during non-designated times (Tr. 652).[17]

F. January 26 and February 11: Respondent's closer supervision and discipline of Phipps

On January 26, Phipps took his lunch break at 11:15 rather than 11:00 due to workload issues (Tr. 677–678). Thereafter, Gomez sent an email with the subject line of "Break/Lunch" to Vaivao and other supervisors and managers (GC Exh. 16). Gomez wrote, "Inbound 1st shift lunch is 11:00 – 11:30. Walking by the upstairs breakroom I noticed Steve Phipps & [receiver] Roy Aja in there at 11:40am." Gomez continued, "I went in and told them individually it was time to get back. Roy told me he went up late cause he was receiving specialty. I told him lets stick to the assigned times and we may have to stop receiving a truck for lunch. Steve told me he was helping shipping and was getting bulk. I told him lets stick to the assigned times. He said shall I just drop everything. I told him communicate with the shipping dock captain that he would be gone for 30min if situation arises again" (GC Exh. 16; Tr. 679). Gomez testified that he sent the email to all supervisors to communicate the information conveyed due to the recent reorganization of the warehouse (Tr. 390–393, 397).[18] Vaivao and Nicklin testified similarly (Tr. 306–307, 463–465).[19]

On February 11, Nicklin and Gomez saw Phipps on the receiving dock around break time (Tr. 153, 406, 745; R Exh. 16).[20] Phipps decided to work through his break that day, and visit the employees on break in the break room (Tr. 674). Nicklin and Gomez approached Phipps, asking him if he knew when break time was and reminding him to take his break (Tr. 153, 155). Phipps testified that the break time was actually over, and Gomez asked him if he had taken his break (Tr. 675). Phipps told Nicklin and Gomez that Respondent never enforced its break policy, and

[17] I found Sheffer to be a highly credible witness. Sheffer has no obvious interest in this proceeding. Furthermore, Sheffer's prior experience as a supervisor for many years at Respondent further bolsters his testimony. Finally, as a current employee who testifies in a manner which contradicts statements by his supervisors, Sheffer's testimony was particularly reliable since he is testifying against his own economic interest. *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1 fn. 2 (2014); *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003). See also *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996).

[18] On January 27, Gomez replied to an email sent by Gutierrez to Banda and him, informing them that they asked an employee to take his scheduled breaks and lunch (GC Exh. 18). On February 5, Gomez sent an email to Nicklin and Banda describing how he enforced the break and lunch times for two employees who exceeded the time permitted or the time that the break/lunch needed to be taken (GC Exh. 17). Nicklin responded to Garcia, Banda, Gomez and Shreeve, stating "We need to make sure everyone is breaking at the times set by the supervisors." (GC Exh. 17). Nicklin commented that further incidents of not taking breaks as scheduled would result in these employees receiving verbal CPDRs.

[19] Vaivao testified that he has received emails similar to the one sent by Gomez, copying other supervisors and managers, concerning employees not taking their breaks when scheduled (Tr. 317–321). However, Vaivao could not recall specific examples (Tr. 324–326). Nicklin similarly could not recall specific examples (Tr. 466–467, 475–476).

[20] Nicklin, Gomez and Phipps provided differing accounts of when the conversation took place on February 11, and what was actually said. These differences are to be expected, and determining what was actually said and when is not relevant to the outcome in this decision. What is relevant is that Nicklin and Gomez observed Phipps not taking his break, and based on Phipps' comments, they spoke to their superiors about their interaction with Phipps.

that they were changing its enforcement (Tr. 675). Phipps also told them that he takes his breaks as needed so he can speak to employees about the Union and that Nicklin and Gomez may verify this with the attorneys (GC Exh. 8; Tr. 676, 721–722).[21] Phipps told them that Nicklin was not allowed to change or enforce policy while there was a union campaign (Tr. 676).[22]

Thereafter, Phipps took his break with other employees (Tr. 681). Phipps passed out the union flyer regarding the Section 10(j) injunction, and made comments about the results (Tr. 681). After 10 minutes on break, Phipps went back to work (Tr. 681). A couple hours later, Gomez told Phipps to go to O'Meara's office (Tr. 681).

Meanwhile, Nicklin and Gomez reported their encounter with Phipps to Vaivao who then called Engdahl and Karen Williams (Williams) (GC Exh. 8; Tr. 406, 460).[23] Vaivao spoke to human resources, and then informed O'Meara about the situation (GC Exh. 8). O'Meara asked that Phipps be brought into his office for a coaching opportunity. Vaivao told Gomez to tell Phipps to come to the administrative offices (Tr. 408).

Then, Vaivao and O'Meara met with Phipps in O'Meara's office (Tr. 151–152; GC Exh. 8).[24] At the start of the meeting, Phipps placed his cell phone on the table to record the conversation (GC Exh. 8, 22(a) and (b); Tr. 423).[25]

O'Meara asked Phipps about not taking his breaks as posted. Phipps responded that Respondent changed the break policy as to how Respondent enforced this schedule. O'Meara stated that he did not know what Phipps was speaking about with regard to policy and enforcement (GC Exh. 9 and 22(b)). Phipps acknowledged the break times and that they were posted on the schedule. O'Meara told Phipps that the break schedule was posted and if employees do not follow the schedule then "we have to counsel them and coach them to make sure they follow the schedule" (GC Exh. 22(b)). Phipps asked if this meeting was a disciplinary

[21] Vaivao created a statement, signed on February 17 but drafted on February 12, memorializing the incident on February 11 involving Phipps (GC Exh. 8; Tr. 165). This statement differs significantly from Vaivao's testimony. In contrast to his statement, Vaivao testified that when Nicklin and Gomez came to talk with Vaivao about Phipps comments' regarding breaks, O'Meara overheard and asked them to send Phipps to talk with Vaivao and him (Tr. 153–154). Furthermore, Vaivao failed to provide significant details as to his next steps after learning of Phipps' comments. I do not credit Vaivao's testimony nor do I credit his contemporaneous notes due to Phipps' audio recording.

[22] After his encounter with Phipps, Nicklin wrote a statement documenting the incident (R Exh. 14). Gomez also wrote a statement that same day about the incident (R Exh. 20; Tr. 832). Gomez noted that it was 1:10 pm, and that Phipps said he takes his break when he sees fit, and that in the middle of a union campaign Respondent cannot change policy (R Exh. 20). Phipps denied saying that he takes breaks when he wants to or when he sees fit (Tr. 721–722).

[23] Williams' position was not identified in the record.

[24] This meeting with Phipps was the first meeting where O'Meara called a Phoenix warehouse employee into his office (Tr. 161–162, 426–427). O'Meara later added that when he was operations manager in Albuquerque, he had many discussions with employees in his office as he had an open door policy (Tr. 788).

[25] Phipps' testimony corroborated the audio recording of the meeting.

action but O'Meara denied as such but said this was a "counseling session" for Phipps to know when to take his breaks (Tr. 160; GC Exh. 8).[26] Phipps told O'Meara and Vaivao that Respondent was changing the enforcement of its break policy in the middle of a union organizing campaign (GC Exh. 8). Again, O'Meara denied knowing what Phipps was referring to, but said he must adhere to posted break schedules and that he could do what he wanted during the designated break time (GC Exh. 8). Phipps explained that Respondent had changed the enforcement of the break policy as it was not enforced in December 2015. Vaivao stated that nothing changed with the break policy and Phipps needed to take breaks with the rest of the team. Thereafter, the meeting concluded (GC Exh. 22(b)).

On February 11, and after the District Court granted the Board's request for Section 10(j) relief, O'Meara sent a letter addressed to Phipps, although the contents of the letter are addressed to all Phoenix warehouse operations employees (GC Exh. 23). In relevant part, O'Meara writes, "I also wanted to say a few quick things about the prior situation with the Bakery, Confectionery, Tobacco Workers and Grain Millers Union. Obviously, everything that happened last year took place a long time before I came back here, so I don't know much about what happened or what was said or done. I will say it's pretty remarkable that after more than a year, the union apparently still doesn't have the cards from enough people to get an election. In my opinion, that's a pretty strong statement" (GC Exh. 23).

G. February 1: Respondent Issues Verbal Warning to Meraz

On Wednesday, January 13, Meraz worked as an inbound forklift operator on the second shift (Tr. 53, 123). On this day, Meraz explained that he was refilling a selection slot for the outbound portion of the warehouse (Tr. 558). Included as part of his duties was to place a full pallet or 30 cases of ranch buttermilk dressing which was special ordered for a catering company. Meraz could not recall specific details of the special order pallet move, but denied that he could have placed it in the wrong slot (Tr. 586–587). Respondent's warehouse had no further items of this special order product.

On Saturday morning, January 16, after reviewing from his home the reports from the prior evening, Vaivao noticed 30 cases of one item, or one pallet, was missing and not delivered to a customer, causing a short of 30 items (Tr. 111, 119, 146–148, 283, 799). The missing pallet was the same special order pallet Meraz refilled in a selection slot on January 13. Vaivao began inquiring as to how the 30 shorts occurred. Vaivao testified that it is rare to short a customer 30 cases of one item that was specifically ordered for a catering company (Tr. 111, 146, 211–212).

Thereafter, Vaivao called Gomez and Nicklin, asking them to find out what happened to the pallet (Tr. 118–119, 268, 485). Gomez had already noticed from the reports that Respondent had shorted a customer 30 items the day before (Tr. 365–366). Gomez testified that he ultimately found the pallet after investigating for 1 hour where the pallet was supposed to be placed and by whom it was incorrectly placed (Tr. 365–367, 372–374). Of Respondent's

[26] I do not credit Vaivao and O'Meara's testimony regarding the February 11 meeting with Phipps. Vaivao and O'Meara repeatedly denied that they told Phipps that the meeting was a counseling session but the audio recording directly contradicts their testimony (Tr. 160–161, 424; GC Exh. 22(b)). Furthermore, in direct contrast to the audio recording, O'Meara denied having any knowledge of Phipps mentioning during their conversation his talking with employees about the Union during his breaks (Tr. 423).

managers and supervisors at Respondent, Gomez was the first to learn that Meraz last handled the missing pallet (Tr. 859). Gomez reported to Vaivao that Meraz scanned one location but that the pallet was missing from the location scanned and in a different location (Tr. 120, 268). Vaivao told Gomez to proceed with a C.P.D.R. (Tr. 122, 132, 284, 374–375).

Vaivao testified that he recommended a C.P.D.R. due to "special circumstances" and a "perfect storm" (Tr. 122, 282–283, 798). Vaivao stated, "This is a real special circumstances that this pallet came in the same day, was put away the same day, and we lost it that same day" (Tr. 122, 214).[27] Vaivao also explained that before inventory control could research where the missing pallet went, the truck needed to leave the warehouse for other deliveries (Tr. 126–127). Vaivao testified that the timing also created these "special circumstances" where there were no additional pallets of this product and the product needed to be delivered that day (Tr. 127). Vaivao stated that he did not consider whether Meraz' scanner malfunctioned, explaining that if the scanner failed to work, then no location could have been scanned (Tr. 124–125).

Before he made the decision to discipline Meraz, Vaivao testified that he did look into the possibility of another forklift operator moving the pallet but Nicklin reviewed the video footage which shows that Meraz operated the only forklift in the area and the "transaction was very, very clean" showing that Meraz put the pallet in the wrong location (Tr. 125, 283, 485–486).[28] Vaivao testified, "I think I looked at the video. It was like, 'Well. Yes, go ahead and administer a CPDR. It's consistent with what I see'" (Tr. 285).

After the investigation, on January 16, Gomez sent an email to human resources, copying Vaivao, Nicklin, Banda and Garcia, stating, "I need a CPDR on Mike Merz [sic] for not following putaway procedures. On 1/13 he moved LPN 634319637 logically to CL2023105 but pallet was physically placed in CL2022505. This error resulted in 30 shorts" (GC Exh. 7; Tr. 375–376).[29]

Also on January 16, inventory control clerk Robert "Lyric" Coleman (Coleman) sent an email to Vaivao along with others regarding the same missing pallet Meraz refilled in a selection slot on January 13 (GC Exh. 7; Tr. 135). Coleman reported that a pallet of ranch buttermilk dressing was received on January 15 by a receiver (GC Exh. 7; Tr. 138). Coleman explained, "Pallet was received on 1/15/2016 by Tim Franks physically but couldn't be found in the reserve it was scanned into or the previous reserve it was scanned in before this one. This is a full pallet

[27] Gomez, Nicklin, and Vaivao testified that the pallet came to the warehouse on Friday, January 15, and went missing the same date. The record does not support their testimony, and thus, I will not credit their version of events regarding Meraz' discipline. Both Meraz' CPDR explanation as well as the task sheet from January 13 shows that the missing pallet was moved by Meraz on January 13. No other evidence was presented to show that Meraz or any other employee moved the pallet again between January 13 and 16.

[28] The video could not be opened by any of the parties, and could not be entered into evidence (Tr. 879). Garcia and Vaivao testified that they reviewed the video footage before issuing the C.P.D.R. to Meraz (Tr. 283, 285, 343–344).

[29] Many of the witnesses testified regarding "put away procedures." Put away procedures are not written in any of Respondent's rules, procedures, manuals or handbooks (Tr. 143). Based on witness testimony, improper put away procedures refers to many examples such as failing to properly put away a product which then is crushed due to falling (Tr. 381–382), or placing a pallet of produce in the wrong temperature zone which is then a product loss (Tr. 382).

pull of 30CS so it's quite frustrating I couldn't locate this pallet *ALL night*. Is there any way for future I can track FTO's for the night to see if or when they actually make the truck or not??? That way I'm not potentially looking for pallet that may have physically already left the entire warehouse! All 30 cases have been locked in CORPCTLR1. We took 30 outs on this as a result" (GC Exh. 7).[30] Coleman further explained that he checked numerous pick slots including the slot where the item was physically scanned, and also up and down aisle 20 around the pick slot (GC Exh. 7).

On or about Thursday, January 21, Gomez and Garcia met with Meraz and gave him a verbal written warning completed on a CPDR (Tr. 54, 337).[31] Vaivao made the final decision to issue the C.P.D.R. to Meraz (Tr. 110). The C.P.D.R. form stated that Meraz "failed to follow proper putaway procedures on 1/13/2016. Associate moved LPN 634319637 logically to CL2023105, but physically placed pallet in CL2022505. This error resulted in 30 shorts" (GC Exh. 5).[32] In other words, Respondent alleged that Meraz failed to put away a pallet in the proper cooler location (CL) which caused the pallet to be missing and created a short, or unavailability, to the customer (Tr. 52–53; 61, 338).[33] Meraz allegedly placed the pallet one bay over from where the pallet belonged (Tr. 65). The distance between where the pallet was scanned and where it was located was approximately 10 feet apart (Tr. 134). The C.P.D.R. form also stated that "any future occurrence of this kind within the next 7 weeks may result in further disciplinary action" (GC Exh. 5).

Meraz initially refused to sign the C.P.D.R. form, and told Gomez and Garcia that he wanted to speak with Santamaria (Tr. 342–343, 519).[34] Garcia called Santamaria and told him that Meraz was coming to speak to him about the C.P.D.R. and that he would scan the C.P.D.R. and the task sheet, which shows Meraz' pallet moves on January 13 (Tr. 343). After leaving the meeting with Gomez and Garcia, Meraz then went to Santamaria who was in his office. Meraz complained that he incorrectly received a C.P.D.R. for allegedly failing to follow proper put away procedures (Tr. 55). Meraz recorded the entire conversation (GC Exh. 20(a) and (b)). Meraz explained how he believed he could not be responsible for the missing pallet, since he worked as an inbound forklift operator and "30 shorts is for outbound side of work" (Tr. 523, 561; GC Exh. 20(a) and (b)). Furthermore, Meraz told Santamaria that no one contacted him that evening about the missing pallet, and he would have looked for it as well (Tr. 525–526). Meraz disagreed that the inventory control employee could not have found the missing pallet since it was found only two bays over (Tr. 526). Meraz told Santamaria that he planned to "file" allegations with outside agencies because he disagreed with the discipline (Tr. 56, 524).

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[30] Coleman did not testify. The record lacks an explanation for why Coleman used the date of January 15 as when this pallet came into the warehouse; Tim Franks worked as a receiver, who reviews products received in the warehouse.

[31] Garcia testified that his investigation of the incident involving Meraz consisted of only reviewing a report which indicated that Meraz was the last employee to handle the missing pallet (Tr. 340).

[32] Santamaria described the "put away procedures" as taking the pallet of product, scanning the pallet and putting the pallet in the appropriate location (Tr. 72).

[33] In this situation, the CL number referenced in the C.P.D.R. refers to a location in the warehouse (Tr. 64, 133). For example, CL2023105 refers to cooler location, aisle 20, 231 is the bay location, and 05 is the level in the bay (bays go up to level 6, 30 feet in the air) (Tr. 64–65, 134, 205). Bay 231 has three slots within the bay (Tr. 134).

[34] Vaivao testified that he received a phone call informing him that Meraz refused to sign the C.P.D.R. (Tr. 137).

Santamaria went with Meraz to the warehouse floor to physically review the locations at issue (Tr. 59, 61, 527). After seeing the location where the pallet was found, Santamaria stated that inventory control should have been written up (Tr. 528; GC Ex. 20(a) and (b) at 7 ("Ok, hey, if anything why isn't the inventory guy written up as well?")). Meraz complained that there were issues with the scanners which could have caused the error (Tr. 68, 528–529). On the way back to Santamaria's office, Santamaria and Meraz called over another forklift operator, and asked the employee to confirm that the scanner system sometimes kicks the locations from the forklift operators' scanners when they are in aisle 18 through 20 (Tr. 67–68, 70, 79–80, 530, 587–588). Thereafter, Santamaria told Meraz he needed to "do some research" and investigate such as speaking with inventory control, and would get back with Meraz (Tr. 52–53, 61–62).

Subsequently, Santamaria reviewed Meraz' pallet movements on January 13 (Tr. 70, 74). Santamaria testified that he did not speak to Gomez or Garcia about the C.P.D.R. they issued to Meraz (Tr. 71). Despite stating that he would do so, Santamaria did not speak to Inventory Control Clerk Coleman who looked for the missing pallet (Tr. 70, 74, 76–77).

On January 25, Vaivao sent an email to Nicklin telling him to send to Santamaria all information he had regarding the issue of the missing pallet, and to copy O'Meara on the email (GC Exh. 7).[35] Vaivao explained that after learning that Meraz refused to sign the C.P.D.R., he asked Nicklin to send the information to Santamaria since Meraz mentioned to Garcia that he would be going to Santamaria (Tr. 136). Thereafter, Santamaria, along with O'Meara, received an email from Nicklin on January 25 with the subject line, "FW: CPDR – Mike Meraz/FW: Missing Pallet Item #2263551" (GC Exh. 6). The email included as an attachment a screen shot of Meraz' tasks on January 13 (GC Exh. 6). This screen shot shows that Meraz pulled the special pallet order at 18:30, and at 18:32 Meraz scanned that product into CL2023105 which was not the location where the special order pallet was ultimately found (Tr. 79; GC Exh. 6).

After his investigation, Santamaria recommended disciplining Meraz because he determined that Meraz was the last employee to handle the pallet, and inventory control could not find the pallet at the location where it was scanned (Tr. 77–78, 85, 88). Santamaria did not consider the possibility that Meraz' scanner failed to function properly at the time of the incident (Tr. 78–79).[36] Santamaria also did not consider whether another forklift operator moved the product to the location where it was ultimately found, not where it was scanned (Tr. 80). Santamaria explained that because forklift operators are paid by their "moves" of pallets, a forklift operator would not move a product without scanning the item (Tr. 80–81).

Before Santamaria met with Meraz, Meraz approached Vaivao about the C.P.D.R. (Tr. 139, 266). Vaivao told Meraz that Santamaria planned to talk with him, and that Santamaria and Vaivao would both go over the C.P.D.R. with Meraz (Tr. 139–140, 266–267).

[35] Vaivao testified that he told Nicklin to copy O'Meara on the email because "he's my boss. I normally copy him on everything that comes my way. I make sure that he understands" (Tr. 137).

[36] Garcia and Gomez testified that a couple of months prior to the hearing, Respondent repaired the warehouse antennas that transmit information from the scanners to the computer system (Tr. 348, 385). Respondent repaired the signals on these antennas many times in the past year because the forklift operators complained that they were losing signal (Tr. 348, 385). When the scanners lose the signal, the forklift operators are frozen out of the computer system (Tr. 348). Gomez admitted that the forklift operators complained to him about the scanner system kicking them out (Tr. 385).

On February 1, Santamaria and Vaivao met with Meraz to discuss the C.P.D.R. (Tr. 78, 128–129; GC Exh. 21(b)). Meraz recorded this conversation as well (GC Exh. 20(b)). Santamaria testified that this was the first time he spoke to Vaivao about this incident with Meraz (Tr. 128).[37] Santamaria told Meraz that he would be receiving discipline for the incident because Meraz was the last employee to "touch" the pallet; Meraz disagreed (Tr. 553). Meraz told Vaivao and Santamaria that he spoke with Coleman after he was initially presented the C.P.D.R (Tr. 619–620). Coleman told Meraz that the pallet was not physically located as indicated in the C.P.D.R. (GC Exh. 21(b)). During this meeting, Santamaria and Vaivao told Meraz that Coleman would be addressed separately (GC Exh. 21(b)).

Meraz ultimately signed the C.P.D.R. (GC Exh. 5). Santamaria testified that he could recall only one other inbound forklift operator being disciplined for failing to follow proper putaway procedures but he could not recall any details (Tr. 82–84). Respondent did not discipline any other employees over this incident with Meraz, including the inventory control clerks (Tr. 801–802).

Vaivao provided an example of a disciplinary action issued to a forklift operator. Respondent issued a verbal warning to Carl McCormack, on March 24, 2015, when he mislabeled 24 apple juice cases which resulted in a mispick and ultimately, a short to a customer (R Exh. 18). Shortly thereafter, Respondent suspended McCormack for excessive mispicks which resulted in shorts to customers (R Exh. 19).

Nicklin testified that previously, inbound forklift operators have been disciplined for failing to follow putaway procedures (Tr. 477). When asked to provide details, Nicklin could not provide any specifics, and stated, "I know it's happened. I don't recall exactly when" (Tr. 477).

Gomez explained that he issued verbal warnings in February 2014 to forklift operators/receivers for a break down in procedures when the incorrect expiration date for a product was entered into the system (R Exh. 21, 22, 23). However, the discipline concerned the receiver function, not as a forklift operator (Tr. 861–862). In addition, Gomez issued a verbal warning to another receiver/forklift operator in January 2013 when he mistagged pallets which resulted in mispicks (R Exh. 24, 25). But again, this discipline concerned the receiver function, not forklift operation (Tr. 862). Finally, in April 2014, Gomez issued a verbal warning to another forklift operator for failure to follow putaway procedures when he improperly stacked pallets causing the product to be crushed (R Exh. 27a –27e, 28). Gomez included photos of the aisle in which the forklift operator improperly stacked the pallets. Gomez also testified that other forklift operators have been disciplined for similar incidents as Meraz but could not provide any specific details (Tr. 866).

[37] Vaivao's testimony is inconsistent, and not credible as to whether he knew Santamaria was investigating the incident involving Meraz after Vaivao recommended disciplining Meraz (Tr. 130). At one point in his testimony, Vaivao explained that he did not know about the investigation until Santamaria sought to meet with Meraz. At another point in his testimony, Vaivao appears to admit that he knew Santamaria was investigating this incident but Vaivao denied speaking with Santamaria during the investigation (Tr. 130, 266–267).

III. ANALYSIS

A. Legal Standards

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish unlawful activity under *Wright Line*, the burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take an adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in union or concerted activity; (2) the union or concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity.[38]

The Board will consider circumstantial evidence as well as direct evidence to infer discriminatory motive or animus, such as (1) timing or proximity in time between the protected activity and adverse action; (2) delay in implementation of the discipline; (3) departure from established discipline procedures; (3) disparate treatment in implementation of discipline; (4) inappropriate or excessive penalty; and (4) employer's shifting or inconsistent reasons for discipline. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Ronin Shipbuilding*, 330 NLRB 464 (2000); *CNN America, Inc.*, 361 NLRB No. 47 (2014) (citing *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995)); *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1 fn. 3 (2014).

Once the General Counsel has met its initial burden that the protected conduct was a motivating or substantial reason in the employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the employer's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Pro-Spec Painting*, 339 NLRB 946, 949 (2003) (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference).

Under Section 8(a)(4) of the Act, it is unlawful for an employer to discipline or otherwise discriminate against an employee because he/she has filed charges with the Board, has testified in Board proceedings and/or has provided testimony in Board investigations. *NLRB v. Scrivener*,

[38] To be protected under Section 7 of the Act, the employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." These elements are analytically distinct, and must be analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014).

405 U.S. 117 (1972). In cases where motive is an issue, the Board analyzes Section 8(a)(4) and (1) violations under the *Wright Line* framework.

B. Section 8(a)(3), (4), and (1) allegations regarding Phipps

1. Phipps' Protected, Concerted Activity, and the Employer's knowledge

The record is undisputed that since April 2015, Respondent was well aware of Phipps' activity of promoting the Union at the Phoenix warehouse, including his role in the prior unfair labor practice proceeding and request for injunctive relief. Vaivao and Gomez admitted that they knew about the union organizing campaign and Phipps' public role in recruiting employees to support union representation. Furthermore, due to Phipps' high profile role in the union campaign, Respondent knew that Phipps spoke to employees about the union organizing campaign and passed out flyers. These flyers included information about the change in upper management when O'Meara came in to manage the warehouse, and when the District Court granted the Board's request for injunctive relief. In addition, Phipps testified in the September 2015 unfair labor practice hearing, and provided affidavits to support the Board's request for injunctive relief. In total, Phipps' engaged in union activity which was protected by the Act, and this activity was well known by Respondent.

2. Respondent violated Section 8(a)(3), (4), and (1) when on January 24 it strictly enforced the employee break schedule

The General Counsel alleges that Respondent strictly enforced its break schedule on January 24 because employees including Phipps engaged in protected activity. Respondent does not appear to dispute that it enforced its break schedule but instead argues that employees including Phipps would have been treated the same absent the protected activity. Respondent insists that the break schedule has always been enforced.

The Board has found that changes in enforcing an existing policy such as a break schedule can violate the Act. *Print Fulfillment Services*, 361 NLRB No. 144, slip op. at 4 (2014) (employer's stricter enforcement of work rules in response to employee's union activity violated Section 8(a)(3) of the Act). As discussed further, the timing as well as Respondent's demonstrated animus strongly points to unlawful motivation for the enforcement of the break schedule.

All witnesses in this proceeding testified consistently that Respondent provides two 15-minute breaks and one meal break per shift. Furthermore, all witnesses testified that breaks should be taken at the designated time with exceptions permitted only by supervisors. This break schedule has been in existence for many years. However, the testimony diverges at this point as to whether Respondent permitted employees to take their breaks at other times prior to January 24. Both Phipps and Sheffer credibly testified that prior to January 24 the employees could adjust their break schedules as long as these variations did not interfere with the operations of the warehouse. Sheffer further explained that he had never been disciplined for not taking his break during the designated time periods, nor was there any discussion about the break schedule with employees. On January 24, however, Respondent changed its work operations, and began to enforce the previously unenforced break schedule. Although denied by Banda, I find that he held a meeting with Phipps and other forklift operators confirming that the break schedule would

now be enforced. Respondent's break schedule was now enforced for all employees, and Respondent spoke to several employees about taking their breaks when designated. Respondent also began to place the break times on the employees' work schedule.

The question then becomes whether Respondent strictly enforced its break schedule for all employees in response to union activity, including Phipps' union activity. I find that the record shows clear animus towards Phipps' union activity and the union activity by other employees, and that Respondent's enforcement of its break schedule was due to the union activity at the Phoenix warehouse.[39] Timing is key. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999). Phipps began organizing the warehouse in early 2015, and continued to do so throughout 2015 and into 2016. Phipps continued to place flyers in the break room and continued to talk with employees during their breaks. Less than 6 months prior to the warehouse reorganization, Phipps testified in support of the Union at an unfair labor practice proceeding. Phipps also provided affidavits in support of the Board's request for injunctive relief. Phipps placed flyers in the warehouse break room in December 2015 warning employees that even though Respondent replaced the warehouse director with O'Meara, Respondent still maintained an antiunion stance. O'Meara also incredibly denied knowing much, if anything, about union activity at the warehouse. It is improbable that Respondent transferred O'Meara to the Phoenix warehouse in late 2015 without informing him about the union campaign. Phipps clearly used breaks to pass out Union flyers and speak with the employees on the other shifts. By enforcing this break schedule, which was previously unenforced, circumstantial evidence shows that Respondent sought to prevent Phipps from talking to employees about the Union during break times other than his own. Under *Wright Line*, Phipps engaged in union activity, Respondent had knowledge of the activity, and Respondent bore animus towards this activity. Thus, the General Counsel has established a prima facie case.

The burden then shifts to Respondent. Respondent asserts that pursuant to the January 24 schedule change, they sought to make sure that all employees knew with whom and what times they should take their breaks. Respondent claims that their actions show no animus but rather "An intention to protect associates from conflicting demands" (R. Br. at 13). Respondent also asserts that they enforced the break schedule with all employees which undermine the General Counsel's theory of animus towards Phipps. On the surface, it seems that Respondent's actions appear legitimate. However, looking at the entire picture of what was occurring at the warehouse undermines Respondent's arguments. Phipps had been working for the past year trying to organize the warehouse. Phipps did not relent in his actions as indicated by his December 2015 union flyer. By using a change in operations to enforce a previously unenforced break schedule, Respondent sought to hide its unlawful motivation behind a business reason. Furthermore, for many years, Respondent tolerated, or looked the other way, when employees altered their breaks. Under a totality of the circumstances, Respondent's actions were a pretext to prevent Phipps from meeting with employees on other breaks. Respondent also enforced its break schedule with all employees, ensuring that they took their breaks as scheduled rather than allowing flexibility as previously permitted. As such, I find that the General Counsel has

[39] The General Counsel urges me to give "persuasive authority" to Judge Wedekind's February 11 decision to establish evidence of prior unfair labor practices which can support Respondent's unlawful motivation (GC Br. at 27). Because Judge Wedekind's decision is not final, I cannot give it persuasive authority or any consideration in this decision. Any unlawful motivation or animus, as I find in this decision, is based upon the record in this proceeding alone.

established, by a preponderance of the evidence, that Respondent violated Section 8(a)(3), (4) and (1) of the Act.

3. Respondent violated Section 8(a)(3), (4), and (1) of the Act when it subjected Phipps to closer supervision on January 26 and February 11

Closely supervising an employee due to union activity violates the Act. *T & T Machine Co.*, 278 NLRB 970, 973 (1986). Respondent alleges that the General Counsel failed to support this claim whereas the General Counsel alleges that Respondent singled out Phipps to supervise his break times.

A *Wright Line* analysis needs to be performed with the burden of proof on the General Counsel. As addressed above, I find that Phipps engaged in protected union activity, and Respondent was well aware of his actions. Furthermore, I find that Respondent closely supervised Phipps with an illegal motive. On two occasions after the start of enforcing the break schedule, Respondent noticed Phipps not taking his break during the time allocated. On January 26, after speaking to Phipps, along with another employee, Gomez sent an email to all supervisors and managers in the warehouse reporting his observations. It was an unusual practice for Respondent to include all managers and supervisors on such a communication.[40] To further support the General Counsel's theory, Gomez reported on other employees not taking their breaks as scheduled but he sent those emails only to one to two other supervisors which undermines Respondent's claim that these emails were sent to all managers and supervisors to keep them informed. Communicating Phipps' whereabouts to all supervisors and managers can only lead to an inference that Respondent supervised him more closely.

Also on February 11, soon after the District Court granted the Board's request for injunctive relief and Phipps began handing out flyers informing employees of the same, Nicklin and Gomez again observed Phipps not taking his break as scheduled. They confronted him, which led to O'Meara and Vaivao's meeting with Phipps. As with the enforcement of the break schedule, the timing of Respondent's actions is suspect. Since February 9, Phipps began handing out flyers publicizing the District Court's order. In so doing, Phipps also met with employees during their breaks to discuss the injunction order. Respondent failed to produce any evidence that prior to January 24 Phipps failed to take his break as scheduled thereby leading me to infer that Respondent closely supervised Phipps in January and February. *Palagonia Bakery Co.*, 339 NLRB 515, 528 (2003) (employer violated Section 8(a)(3) and (1) of the Act by following a leading union adherent around the plant); *International Paper Co.*, 313 NLRB 280 (1993) (employer illegally followed an employee at a plant in an effort to thwart his support of the union).

I disagree with Respondent's argument that the General Counsel has failed to produce evidence concerning "the typical level of supervision at the warehouse" thereby abandoning its allegation (R. Br. at 10). The General Counsel does not need to provide evidence contrasting the "typical level of supervision" with "closer supervision." Instead, the General Counsel, under *Wright Line* only needs to prove that Respondent's actions were based on a discriminatory motive. Again, the overwhelming evidence shows that Respondent sought to ensure that Phipps

[40] Both Vaivao and Nicklin testified to the contrary but failed to produce any examples; thus I do not credit their testimony.

took his own breaks which prevented him from meeting with other employees to discuss the Union. See *Stabilus, Inc.*, 355 NLRB 836 (2010) (finding that the employer violated the Act when it told a union supporter he could not eat lunch where previously permitted, telling employees who were normally free to converse with coworkers they could not talk about the union, and standing around watching and monitoring activities of union supporters amounted to an effort to crack down on union supporters and inhibit their ability to organize their coworkers). In addition, based on the credible testimony of Phipps and Sheffer, employees were able to take their breaks with some degree of flexibility, and the record is devoid of evidence that Respondent spoke to employees before January 24 about their breaks or even sent emails to one another about employee breaks.

Based on the above, I find that Respondent violated Section 8(a)(3), (4) and (1) of the Act by closely supervising Phipps on January 26 and February 11.

4. Respondent violated Section 8(a)(3), (4) and (1) of the Act by verbally disciplining Phipps on February 11

The General Counsel alleges that Respondent counseled Phipps on February 11 after he told Nicklin and Gomez that he was delaying his break that day to talk to employees with another break time about the Union. Respondent argues that Phipps was not disciplined on February 11.

Again, as set forth above, a *Wright Line* analysis applies.[41] Phipps engaged in protected union activity which was well-known to Respondent. Before addressing the issue of animus, I must first address the issue of whether Phipps was disciplined on February 11. O'Meara called Phipps into his office to talk with Vaivao and him about why he did not take his break as scheduled. Since Phipps told Nicklin and Gomez that he delayed taking his break to talk with the employees on another break schedule about the Union, I reasonably infer that Nicklin and Gomez told O'Meara and Vaivao what Phipps told them. During this meeting, O'Meara and Vaivao repeatedly told Phipps that he was being counseled about taking his breaks with others. Respondent argues that the use of the term "counseling" was mere semantics since O'Meara told Phipps he was not being disciplined. Furthermore, Respondent argues that O'Meara and Vaivao never used counseling as the first step of discipline so even if they used the term counseling they were not intending to discipline Phipps.

The circumstances presented indicate that Respondent disciplined Phipps by counseling him on February 11. First, Phipps was called into O'Meara's office with Vaivao. Although only in the Phoenix warehouse for a short time, O'Meara's meeting with Phipps was the first time he called an employee into his office. Furthermore, O'Meara is the highest ranking official working at the warehouse. Rather than permitting Phipps' first level supervisor to speak with him about the break schedule, O'Meara chose to talk with Phipps directly. Also, O'Meara repeatedly told Phipps that he was being counseled, not coached as O'Meara testified. Counseling is the first step in Respondent's disciplinary process. Even though no counseling memos or any other forms of discipline were placed in Phipps' personnel folder, the disciplinary policy does not

[41] An analysis under *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), is unnecessary as Respondent is not arguing that Phipps' actions lost the protection of the Act. Furthermore, I independently find that an *Atlantic Steel* analysis is not needed.

indicate if such notation is required. Respondent argues that Phipps knew that counseling, although listed as the first level of discipline in the employee handbook, was never used as a first level of discipline. Even if Phipps knew that Respondent did not counsel employees in the past as the first line of discipline, an employee could reasonably assume that they were being disciplined. Furthermore, O'Meara and Vaivao could also recall this meeting for purposes of discipline in the future. See *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 566 (2010) (finding verbal warnings not documented in employees' personnel folder as required by employer's policy were nevertheless discipline for purposes of progressive discipline where supervisor would likely remember it). Thus, I find that the February 11 meeting constituted an adverse action.

Now, turning to animus, much of the same animus as found previously applies here. The same week that Phipps was closely supervised, Phipps passed out flyers regarding the District Court's decision granting injunctive relief. Thus the timing of this adverse action comes on the heels of Phipps' latest union activity. *The Sheraton Anchorage*, 363 NLRB No. 6 (2015) (finding that an employee's discharge which occurred 2 months after giving testimony "substantially adverse" to his employer, suggests that the motivation behind his termination was his protected activity, his testimony). Respondent's argument that because Phipps had been distributing flyers for the past year with no prior discipline that Respondent could not have been motivated by animus on February 11 is nonsensical. The totality of the evidence shows that Respondent harbored animus towards Phipps' union activities. Also, Respondent did not discipline any other employees for taking their breaks not at the designated time, and in fact tolerated such behavior previously. Discriminatory motive will often be inferred when the employer has long tolerated similar conduct. *Cadbury Beverages v. NLRB*, 160 F.3d 24 (D.C. Cir. 1998) (firing employee for changing lunch schedule where written policy against doing so previously never enforced). Furthermore, the same day that O'Meara and Vaivao met with Phipps, O'Meara sent a letter to all employees addressing the union organizing campaign, noting that the Union still does not have the showing of interest to have an election which in his opinion was a "pretty strong statement." This statement hints at animus towards the union campaign. Respondent's actions were a pretext to prevent Phipps from discussing the Union with other employees. Accordingly, the discipline violated Section 8(a)(3), (4) and (1) as alleged.

C. Section 8(a)(3), (4) and (1) allegations regarding Meraz

1. Meraz' Protected, Concerted Activity, and the Employer's knowledge

The record is also clear that Respondent was aware of Meraz' pro-union stance. Although Meraz was not as vocal as Phipps with regard to his union support, Meraz passed out union flyers and submitted an affidavit to the Board to support the request for injunction. Also, Meraz attended 2 days of the September 2015 unfair labor practice hearing. Thus, Meraz engaged in protected union activity. In addition, Vaivao, who is second in command at the warehouse, admitted to knowing that Meraz supported the Union. Thus, the employer had knowledge of Meraz' protected union activity.

2. Respondent violated Section 8(3), (4), and (1) of the Act when on February 1 it issued a verbal warning to Meraz

The General Counsel argues that Respondent unlawfully issued a verbal warning to Meraz as proven by its disparate treatment of Meraz, poor investigation of the missing pallet, and pretext. Respondent argues that no animus existed toward Meraz and the discipline issued was justified.

Under the legal framework of *Wright Line*, the General Counsel may prove animus by the record as a whole including timing, disparate treatment, and failure to conduct an adequate investigation. *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1 fn. 3 (2014). I find that the General Counsel has proven its burden for the following reasons.

First, Respondent's investigation into the missing pallet was poorly conducted. Vaivao and Santamaria admitted not seriously considering whether any other forklift operator moved the pallet. Vaivao relied upon the video recording of the incident. However, he testified in an uncertain manner as to whether he reviewed the video himself but then later stated that the video showed clearly that Meraz moved the missing pallet. They also did not consider whether the scanners were not working that day even though there had been reports from other forklift operators of problems with the scanners. Furthermore, Santamaria, who conducted his own investigation after the CPDR was initially issued, did not speak to inventory control clerk Coleman. Coleman emailed Vaivao complaining about not being able to find this missing pallet, which was received the day before and moved by another employee. Coleman's email raises suspicion as to whether the missing pallet was only moved by Meraz. However, Santamaria did not question Coleman or any other inventory control clerk. *American Crane Corp.*, 326 NLRB 1401, 1417 (1998) (the Board held that an employer's investigation is evidence of discriminatory motive when it fails to interview key witnesses). Even when Meraz told Vaivao and Santamaria on February 1 that Coleman told him that the missing pallet was not found where Respondent claimed, neither Vaivao nor Santamaria questioned Coleman. The weight of the evidence shows that Respondent failed to conduct an adequate investigation to justify disciplining Meraz.

Secondly, the reasons provided by Vaivao for the discipline are pretextual. Vaivao testified that the missing pallet created "special circumstances" since it was received, moved and missing all the same day. Gomez and Nicklin testified similarly. In contrast, Meraz' task sheet shows that he moved the pallet 2 days prior to the item becoming missing. The CPDR issued to Meraz listed the dates on the task sheet of when the item was received and where it was placed. Vaivao failed to reconcile any of these differences before deciding to discipline Meraz. False reasons are evidence of unlawful motive. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 7–8 (2014).

Third, based on the evidence presented, Meraz is the only forklift operator Respondent disciplined for not following proper putaway procedures. Respondent claims that another forklift operator committed a similar failure when he mislabeled a case of juice which caused a short to a customer. Respondent also provided an example of a forklift operator who failed to stack pallets properly resulting in damage to product. Respondent provided a few other examples but no other employees' alleged misconduct compares to that alleged against Meraz. When questioned regarding similar situations, Nicklin and Gomez could not provide any other examples but were certain they have disciplined employees for similar misconduct in the past.

Thus, Respondent engaged in disparate treatment of Meraz when it failed to prove it disciplined other employees for failure to follow proper putaway procedures. See *Carpenters Health & Welfare Fund*, 327 NLRB 262 (1998) (finding disparate treatment where employer offered no evidence that it had ever discharged others for violating telephone policy); *Consec Security*, 325 NLRB 453 (1998) (finding disparate treatment where employer failed to demonstrate it had ever discharged an employee for reason provided).

Furthermore, contrary to Respondent's argument, the General Counsel need not prove specific animus toward Meraz, but instead generalized animus towards protected concerted activity. In this instance, along with its other unfair labor practices, Respondent's action of enforcing its break schedule to ensure that Phipps and other pro-union employees could not speak to employees demonstrates Respondent's animus towards the union campaign. *EZ Park, Inc.*, 360 NLRB No. 84, slip op. at 1 fn. 3 (clarifying that *Wright Line* does not require a showing of particularized animus) (2014); *Encino Hospital Medical Center*, 360 NLRB No. 52, slip op. at 2 fn. 6 (2014); *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn. 2 (2015).

Respondent failed to satisfy its burden of proof that it would have disciplined Meraz despite his protected conduct. "It is … well settled … that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). In sum, based on the above analysis, I find that Respondent violated Section 8(3), (4), and (1) of the Act when it issued a verbal warning to Meraz on February 1 for failing to follow proper putaway procedures.

CONCLUSIONS OF LAW

1. Respondent, Shamrock Foods Company, has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By subjecting its employees, including Steve Phipps, on January 24 to stricter enforcement of its previously unenforced break schedule, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

4. By subjecting Steve Phipps to closer supervision on January 26 and February 11, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

5. By verbally disciplining Steve Phipps on February 11, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

6. By issuing a verbal warning to Michael Meraz on February 1, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this regard, Respondent shall expunge Meraz' February 1 verbal warning and any discipline related to Phipps' February 11 verbal discipline from their records. Respondent shall also cease and desist from more strictly enforcing its employee break schedule and closer supervision of Phipps. I will order that the Employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id., slip op. at 3.

The General Counsel requests that the notice be read aloud at the Phoenix facility to further effectuate the policies and purposes of the Act. Requiring an owner or high official of a company or a Board agent to read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. The reading aloud of a notice is an "extraordinary" remedy, and has been ordered in egregious circumstances. *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003); see also *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) (ordered remedy included Board agent to read aloud notice to the employees to "ensure a free and fair rerun election"). In my opinion, looking at the allegations underlying this decision alone, the conduct of Respondent in this case does not warrant the recommendation of an "extraordinary" remedy. Respondent's prior unfair labor practice, which was affirmed by the Board, occurred in 2003 thereby being too remote in time to recommend such a remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) More strictly enforcing its break schedule with employees, including Steve Phipps, because they engaged in protected concerted activities.

(b) Closely supervising Steve Phipps due to his protected concerted activities.

(c) Issuing a verbal discipline to Steve Phipps for engaging in protected concerted activity.

[42] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Issuing a verbal warning to Michael Meraz for engaging in protected concerted activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of the Board's Order, remove from its files any reference to Steve Phipps' verbal discipline and Michael Meraz' verbal warning and within 3 days thereafter, notify each individually in writing that this has been done and that the discipline will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, the attached notice marked "Appendix"[43] on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 24, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2016

Amita Baman Tracy
Administrative Law Judge

[43] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT more strictly enforce the previously unenforced break schedule due to your protected concerted activity.

WE WILL NOT subject Steve Phipps to closer supervision due to his protected concerted activity.

WE WILL NOT discipline Steve Phipps and Michael Meraz for their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful verbal discipline of Steve Phipps and verbal warning of Michael Meraz, and notify each individually in writing that this has been done and that the discipline will not be used against them in any way.

SHAMROCK FOODS COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004–3099
(602) 640–2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-169970 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640–2146.